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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 653

J. D. COLLINS,

Petitioner,

vs.

W. R. WAYLAND, FRED G. HOLMES, DEL E. WEBB, AND THE CONSOLIDATED MOTORS; AND THE CITY OF PHOENIX.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA AND BRIEF IN SUPPORT THEREOF.

THOMAS A. FLYNN,
Counsel for Petitioners.

E. E. SELDEN,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 653

JAMES DEAN COLLINS, HATTIE L. MOSHER, AND JULIA C. COLLINS,

vs. *Appellants,*

W. R. WAYLAND, ET AL., AND CITY OF PHOENIX, A MUNICIPAL CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA AND BRIEF IN REQUEST THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States, Greeting:

Your petitioners, J. D. Collins, H. L. Mosher, and Julia C. Collins, respectfully pray for a Writ of Certiorari to review the judgment in the Supreme Court of the State of Arizona entered on the 15th day of July, 1942, sustaining the judgment of the Superior Court of Maricopa County, State of Arizona, rendered on the 19th day of December, 1940. The Motion for Rehearing in the Supreme Court of the State of Arizona having been denied September 16th, 1942.

Short Statement of Matter Involved.

This matter was commenced by suit filed by J. D. Collins against W. R. Wayland, Fred G. Holmes and Del E. Webb, May 18, 1938, to enjoin them from trespassing upon the land of J. D. Collins, described as follows in the Amended Complaint filed May 31, 1938:

> "That certain twenty foot strip of land situate and lying just west of what is sometimes called Lots 7, 8, 9, 10, 11 and 12, in Block One (1) of Churchill Addition to the City of Phoenix, Also, that certain twenty-five foot strip of land lying just north of what is sometimes called Lot 9, in said block and addition. All in Maricopa County, Arizona."

This Amended Complaint alleged that April 25, 1938, Wayland, Holmes and Webb, entered upon Plaintiff Collins' land and took forcible possession thereof, wrecked permanent structures and carried away the materials. That plaintiff, through his agent and servant, placed written notices on Collins' land, protested and warned against the acts of trespass, to no avail. Wayland, Holmes and Webb took possession by overwhelming force of men. When the plaintiff's agent and servant tried to prevent the trespass they shoved, pushed, and slammed lumber and materials up and against her body and person. They kept armed guards on the premises to terrorize plaintiff's servant and to patrol on Collins' land. The plaintiff alleged many more unlawful acts of Wayland, Holmes and Webb, of irreparable injury, and that they were exercising Complete Dominion Over the Soil in Derogation of the owner's right

> "* * * to make use of the peaceful ownership of his land as guaranteed to him by the Constitution of the United States especially of the Fourteenth Amendment thereto."

Plaintiff Collins prayed, in his amended complaint, that Wayland, Holmes and Webb be permanently enjoined from thirteen acts, a, to m, inclusive. m—Was "That defendants be enjoined from preventing this plaintiff from exercising complete DOMINION over his soil".

It is apparent that from April 25, 1938, to the filing of this Petition for Certiorari, a period of nearly five years, that no relief has been granted.

In their original answer respondents Wayland, Holmes and Webb did not claim any part of the land described in the Amended Complaint as public property but alleged that in 1926, and for a long time prior thereto, the plaintiff, James Dean Collins, was the owner of a "Twenty Foot Strip" and 200 feet by 135 feet lying East of it, in a joint Cross Complaint, and claiming an easement to connect with a sewer line running under the "Twenty Foot Strip" because to make such connection elsewhere would be of great expense. They claimed an easement to connect with the sewer "by implied grant".

In his Answer to the Cross Complaint Plaintiff Collins admitted his ownership of the Twenty Foot Strip and the existence of a sewer thereunder. He denied that the City had paid for its construction. He alleged that H. L. Mosher was charged with the same. He denied that it was constructed for the public. This Answer is verified by H. L. Mosher.

The City of Phoenix then filed an Application for Leave to Intervene in the Cross Action of Defendants Wayland, Holmes and Webb. The City then filed an "Adoption of Defendants' Pleadings." Collins then filed a Motion to Strike the intervention papers as they were not verified, and for other reasons, among them:

> "If the City of Phoenix has an easement it could only be made effective by condemnation proceedings. It is a taking of private property without just compensation

and without due process of law contrary both to the federal and state constitutions."

Collins then files an Amended Answer to the Cross Complaint again alleging that H. L. Mosher had paid for the sewer; That the Then Owner was a minor; that there was a permanent structure at the South end of the Twenty Foot Strip and two fences running clear across said strip; that previously the property had been connected with the Center Street sewer; that cross complainants could connect with Center Street sewer for $500.00 while to connect with Collins' sewer would depreciate his property at least $5,000.00; that Wayland and Holmes and their contractor Webb had full actual knowledge and notice of Collins ownership before they started construction of the building; that the premises did not even resemble an alley until the defendants, themselves, tore down the permanent structure at the South End. This Amended Answer to the Cross Complaint was verified by H. L. Mosher.

Wayland, Holmes, Webb, and the City then file an Amended Cross Complaint in which they again allege that in the year of 1926, and for a long time prior thereto, that James Dean Collins was the owner of the Twenty Foot Strip and claiming an easement to connect because of the expense of other connections.

At a court hearing July 5, 1938 Collins filed a receipt for City taxes paid for the strip for the year of 1937 of $103.13. This was paid October 6, 1937, over 6 months before any act of trespass was committed by Wayland, Holmes and Webb. The City assessment set a value of $4,020.00 on the South half of the Strip and a valuation of $1,840.00 on the North 150 feet, making a total amount, for assessment purposes of $5,860.00. This receipt does not include the 25 foot strip on which Collins has also alleged trespass.

At the said court hearing only the attorneys for Wayland, Holmes and Webb were present. The City did not appear. The attorney for Collins filed a Notice of Petition for Removal to the Federal Court, the Petition for Removal and the Bond for Removal. The Removal was denied by the court. At a court hearing the next day the court approved of a Bond in support of a restraining order against Collins preventing interference with the City in making a connection with Collins' sewer. August 8, 1938 the Superior Court allowed the case removed to the Federal Court.

From a Motion to Dismiss filed by H. L. Mosher June 3, 1940, it appears that she was brought in as an additional party defendant over her objection and that cross complainants are attempting to take her property without due, or any process of law, whatsoever, and that it was done in the Federal Court. That the case having been remanded was proof that the Federal Court had no jurisdiction over the case.

June 7, 1940, Wayland, Holmes, and Webb, and the City of Phoenix file a second Amended Cross Complaint. Practically the only difference in it and the Cross Complaint filed June 25, 1938, and the First Amended Cross Complaint filed July 5, 1938, is that in the first two pleadings filed they allege that James Dean Collins WAS THE OWNER and they merely prayed for an easement to connect the sewer. While in the Second Amended Cross Complaint they allege that James Dean Collins claimed to be the owner of land lying East of it together with the Twenty Foot Strip,

> "• • • the said Twenty Foot Strip and cross complainants' property forming (together with other property in said Block One (1) of Churchill's Addition THEN OWNED BY PLAINTIFF) one single tract of land."

The First Cross Complaint merely prays for an easement to connect a sewer. The Amended Cross Complaint like-

wise asks for an easement to make sewer connections. However in this third pleading, the Second Amended Cross Complaint, filed June 7, 1940, just two years after the court had approved a Bond to indemnify Collins for any damage to him by the sewer connection, and the Sewer had been connected, Cross Complainants Wayland, Holmes, Webb, and the City of Phoenix, Intervenor, pray that it be adjudicated that the Twenty Foot Strip is a public alley or that they be decreed an easement to construct a sewer connection thereon.

The word "Alley" was used for the first time two years after the connection had been made under a Bond.

Before the case came to trial the building which the Petitioner Collins had sought to enjoin from having its construction work and storage of materials occupying his entire holdings, dominating his land, and, by overwhelming force of men, and an armed patrol, prevented his use of his own land, digging up and excavating his soil; had been completed, and the contractor had no further need of Collins' land as a construction yard.

June 7, 1940, simultaneous with the filing of the Second Cross Complaint, Claude Dye, represented by the same attorneys that Wayland, Holmes and Webb had employed, asked permission to intervene; but paid no filing fee for his intervention; which was allowed by the court. Dye prayed that the strip of land be adjudged and decreed to be a public alley. This plea of Claude Dye, who for over the two years of the court progress of the action, had been a stranger to the proceedings, for the first time injected into the cause the direct claim that the land in question was a public alley. Since the filing of the complaint for enjoining Wayland, Holmes and Webb, from using his ground as a construction yard, by Collins, May 18, 1938, up to July 7, 1940, no claim, nor prayer, of Wayland, Holmes, Webb, nor the City of Phoenix, claimed, or asked for, one thing beyond

an easement, by implied grant, to connect their new building with the sewer on Collins' land.

The Requests for Admissions on page 85, and the Response of the City of Phoenix on page 114, of the Certified Copies of the Original Documents filed, show that a Temporary Restraining Order was given by the court July 11, 1938, in pursuance of a bond for $1,500.00 which bound the bonding Company and Wayland, Holmes, Webb and the City of Phoenix to James Dean Collins for costs and damages sustained by him for a wrongful connections. This bond was signed by the City of Phoenix, officially. The City Attorney sent a letter to the Superintendent of the Water Department (who also handles sewers) which contained these words:

> "Under the protection of this order you may proceed to make the sewer connections required, and if your employees are interfered with you should immediately communicate such fact, to Mr. Charles Strouss, attorney for defendants Wayland, Holmes and Webb that appropriate contempt proceedings may be instituted, and such interference prevented.
>
> Very truly yours,
>
> (Signed.) HESS SEAMAN,
> *Assistant City Attorney.*"

A copy of the Restraining Order was enclosed and this order referred to:

"Plaintiff's and Cross Defendant's Twenty Foot Strip". The employees of the City did the work of connecting the sewer but the costs of it was given to them by the cross complainants as the City cannot bear the expenses of work done on private land.

In the Responses the City acknowledged many acts which were an acknowledgment of the private ownership of the

land, such as twice attempting to condemn the South 7.75 feet for Street Widening purposes, the creation of assessment districts which included it as privately owned land. These Responses were filed by the City of Phoenix October 26, 1940, after the case had been remanded from the Federal Court. The case remained in the Federal Court approximately two years when it was remanded without any Motion therefore being made.

The trial was set for November 7, 1940. The Consolidated Motors Incorporated, was brought in as an Additional Party Defendant, but they paid no Answering Fee. The Petitioners requested the usual twenty days time to plead a Reply to them but their motion was refused and denied, whereupon the Petitioners withdrew from the trial and the case proceeded in their absence.

The Superior Court found the Twenty Foot Strip to be a public alley and the case was appealed to the Supreme Court of the State of Arizona where the judgment of the lower court was affirmed.

In the Opinion of the Supreme Court it was said in effect that the annexation of the Twenty Foot Strip in accordance with a map showing the Strip to be an alley amounted to a dedication.

It is the contention of your petitioners that they have been deprived of their property without due process of law because the case went to trial against a party newly brought in without allowing additional time to answer and for the further reason that the Opinion of the Supreme Court placed an interpretation upon the Statutes of 1893 which make said statute unconstitutional and which upon the face of the decision and the record have deprived your petitioner, J. D. Collins, of his property without due process of law and without just compensation.

Statement Disclosing Jurisdiction of This Court.

This cause was commenced by complaint filed in the Superior Court of Maricopa County, State of Arizona.

After removal of the cause to the Federal Court and its remand back to said Superior Court a cross complaint was filed by respondents asking to quiet title of the Twenty Foot Strip as an alley in intervenor City of Phoenix. This was entitled "Second Amended Cross Complaint". Petitioner J. D. Collins also claims title to said Twenty Foot Strip of land. Record page 60. Adopting page 42.

The cause came on for trial and judgment was rendered by the Superior Court in favor of Respondents. Record p. 154.

The cause was appealed to the Supreme Court of Arizona where the judgment of the Superior Court was affirmed (R. 195).

A Motion for Rehearing was duly filed and said Motion for Rehearing was denied September 16, 1942 (R. 185).

Three months have not yet elapsed since said date.

The Supreme Court is the highest court of the State of Arizona.

See:

> Arizona Code Annotated 1939, Vol. 1, page 123; the Constitution of Arizona, Article VI, Section 1; and page 125, of said Arizona Code Annotated 1939; the Constitution of Arizona, Article VI, Section 4.

Proceeding to trial without allowing further time to petitioners after a new party was brought in as well as the interpretation placed by the Supreme Court upon certain statutes of the State of Arizona and the effect of such statutes as bringing about a dedication of Petitioner Collins' land without proper notice and wholly without compensa-

tion amounted under the evidence in the case to a taking of said petitioner's property without due process of law.

The jurisdiction of the Supreme Court of the United States is therefore invoked by:

United States Code Annotated, Title 28, Section 344 (b), being Judicial Code Section 237 Amended.

Questions Presented.

1. The first question presented is whether proceeding to trial after bringing in a new party without allowing additional time to plead, and over the objection of petitioners is a denial of due process of law?

2. The second question presented is whether the City of Phoenix can take the property of a private citizen by annexing territory in which the property is situated in accordance with a plat drawn by a draughtsman for the City itself showing the property as a public alley, and wholly without compensation or notice except the mere notice of the annexation.

Reasons for Allowance of Writ.

1. The Supreme Court of the State of Arizona has decided in effect that the property of Petitioner J. D. Collins was dedicated as a public alley by reason of its mere annexation in 1895 in accordance with a map prepared by a draughtsman of the City of Phoenix showing petitioner's property as an alley.

Annexation proceedings were never intended as a method of taking private property for public use. No machinery for appraisal or compensation is set up and the universal understanding of the term annexation is entirely foreign to condemnation and therefore the owner of property is not put upon notice or inquiry as to any intention to confiscate his property.

First Reason.

Whenever a new party is brought into any cause the opposing party should be allowed twenty days or at least some reasonable time to plead to the new party.

By proceeding to trial immediately upon bringing in a new party over the objection of petitioners as the record shows was done was a denial to petitioners of their day in court and petitioners were justified under such conditions in leaving the court room rather than remaining and thus possibly waiving any objection to the constitutionality of proceeding in this summary fashion.

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E. E. SELDEN,
Associate Counsel.

BRIEF.

Opinion of the Supreme Court of the State of Arizona.

The Opinion rendered in this cause is found in:
127 Pac. 2d. at page 716.

Jurisdiction.

The facts upon which your petitioners rely for jurisdiction of this Court are fully set forth in the Petition for Writ of Certiorari, Page 1, and for the sake of brevity incorporated in this Brief by reference, only.

Facts.

The facts are also stated in the Petition for Writ of Certiorari, page 2.

Specifications to Be Urged.

1. The Superior Court erred in proceeding to trial over the objection of Petitioners without allowing time to plead to a new party brought in on the day of trial.

I.

The State Supreme Court erred in upholding the ruling of the Superior Court in proceeding to trial summarily in the absence of, and over the objection of, Petitioners.

2. The Superior Court erred in holding the twenty foot strip to be an alley and the Supreme Court erred in holding that the annexation of the twenty foot strip according to a map of Churchill Addition drawn by a draughtsman working for the City of Phoenix, itself, amounted to a dedication of Petitioner Collins property as a public alley.

ARGUMENT.

Point I.

Where the pleadings show that the respondents Wayland, Holmes, Webb and the City of Phoenix; who had previously claimed nothing but an easement by implied grant to connect with a sewer on Collins' land for the use of a building that Contractor Webb was constructing for Wayland and Holmes on their abutting land; came into the case, two years after its inception, and their sewer had already been connected under the protection of a $1,500.00 indemnity bond; and in a Second Amended Cross Complaint claimed it as a public alley, the record shows that petitioners pleaded that the Consolidated Motors were a necessary party to the litigation in as much as it had some kind of a lease from Wayland and Holmes which lease is not of record. Respondents brought in the Consolidated Motors, or purported to, as the record shows that their Statutory Answering Fee was not paid, as an additional cross complainant on the day of the trial and it adopted the pleadings which Wayland, Holmes, Webb, and Intervenor City of Phoenix had set forth in their Second Amended Cross Complaint. For all that is known the Consolidated Motors, Incorporated, may have a Ninety Nine (99) Year Lease on the premises abutting on Collins' land and be the real party in interest.

Whether Petitioners actually had any additional defense against the new cross complainants is immaterial. Petitioners were denied the time to investigate and find out what, if any, defense they did have. Rather than waive their objection to proceeding, blindly, under the conditions the record shows that petitioners withdrew from the trial.

The decision of the State Supreme Court rested principally upon an alleged dedication which arose by reason of the annexation of Churchill Addition in accordance with an

ordinance passed by the Common Council and a map drawn in 1895 by a draughtsman who may have been working for the City.

This Ordinance was No. 192 and was approved and passed February 27, 1895. The Ordinance was attested by the City Recorder. It was recorded four months later, June 27, 1895. To the right of the Ordinance, as recorded, is a drawing made by C. J. Dyer, Draughtsman. This drawing shows alleys in the Lount Tract but the streets are closed up at each end. There are Block numbers but no Lot divisions are shown. Neither the alleys, nor any other portions of the Lount Tract, show any dimensions.

Above the map are some words which recite that June 24, 1895, R. L. Rosson, Mayor of the City of Phoenix, certified that the map annexed was an accurate map of the territory annexed. The Mayor of Phoenix at the time the Ordinance No. 192 was passed, and who approved of the ordinance, was J. D. Monihon. The certificate of R. L. Rosson, who purported to be mayor, is not attested by the City Recorder. Neither does it bear the Official Seal of the City. The drawing is labelled "Plat of the Survey of Churchill Addition". There is nothing on the drawing to indicate when the "SURVEY" was made, by whom, or why. So far as the City of Phoenix is concerned the map is unofficial. The Annexation Ordinance recorded is probably a correct copy although it is not certified by anyone with apparent authority. There is nowhere on this record ordinance, nor on the map, any word to indicate that the City of Phoenix intended it to be a "Dedication".

The use of the word "Dedication" in connection with the map and ordinance was first used in the Supreme Court Opinion (R. 192), when it said:

> "* * * The delineation of the alley through Block 1 on the 'accurate map of the territory annexed' * * *

is a dedication to the public as much as the streets shown on such map."

This Court will take judicial knowledge that the City of Phoenix by Ordinance No. 275, did, on September 7, 1898, adopt an Official Plat of Churchill Addition which included the Lount Tract.

Collins v. *City of Phoenix,* 269 Federal, at page 221.

This later plat completely superseded the earlier one on which the decision of the Supreme Court was based.

It was the Ordinance of September 7, 1898 and not the Ordinance of February 27, 1895 which governed when the case was tried.

Yet because the petitioners were not present the map of 1898 was not put in evidence and petitioners have suffered irreparable injury unless the cause is now reversed or remanded for a new trial.

Petitioners were clearly entitled to a reasonable opportunity to present their defense against every defendant and cross complainant including the Consolidated Motors Incorporated.

Simpson v. *Stanton,* 196 S. E. 64.

This point was urged in the Superior Court at the trial. Pages 133, and 129; and page 122 of Collins' Motion sets forth the reasons, all in the Certified Copies. Also on page 159, Points relied upon in Motion for a New Trial. It was assigned as error in petitioners Opening Brief. The denial of this proposition is inherent in the decision of the Supreme Court as well as of that of the lower court.

Point II.

The court erred in holding that the annexation of Churchill Addition to the City of Phoenix amounted to a dedication of the property of Petitioner Collins.

The respondents stated in their brief that the annexation of Churchill Addition amounted to a dedication of the twenty foot strip as an alley. Petitioners paid little attention to this contention that the annexation itself could amount to a dedication. The very statement of such a proposition would seem to be its own best refutation. It was pointed out however that such a ruling would be contrary to the Fourteenth Amendment. Reply Brief page 12.

Inasmuch as the respondents never purported to rest their case upon the mere annexation proceedings and map petitioners had no opportunity to raise the Due Process Clause as a defense in the Superior Court.

The Opinion of the Supreme Court shows that the court avoided any comment upon the "structure" which was torn from the premises by Respondent Webb by his own admission. Page 22 of the Certified Copies, while on page 119, Exhibit A, filed by the City itself, is the Permit which directed him to:

> "Wreck and remove only that portion of building located upon the above mentioned lots."

the above mentioned lots were Lots 9, 10, 11 and 12, Block 1, Churchill. The building he wrecked was on the then-called private land of J. D. Collins. The Supreme Court avoided, also, comment upon the fact that the twenty foot strip had been treated as private property in widening proceedings brought by the City and carried to judgment by the City, page 101 of the Certified Copies.

The Supreme Court also avoided any comment on the Ordinance and Map adopted by the City in 1898.

The only reasonable conclusion to be drawn from the Supreme Court's omission to comment on any of these matters, or on any matters of evidence, is that the Opinion turns squarely and solely upon the annexation as a dedication.

That the decision was a taking of property without due process of law and without compensation was strenuously urged in the Motion for Rehearing on page 16, of that Motion (R. 210), which was the first opportunity petitioners had to raise the point so far as the record outside of the briefs is concerned. The quotation used on the said page 16 is taken from that of Chief Justice Hughes in cases Nos. 6 and 7, decided in the October Term of 1932, which rested on the question whether the streets and alleys in the Lount Tract, exactly the same tract of land, as in the instant case, involved a Federal Question. The Supreme Court of the United States reversed previous decrees, dismissing the cases for lack of a Federal Question.

The view clearly taken by the Supreme Court in this cause is that the annexation proceeding in accordance with a certain map drawn by some draughtsman for the City of Phoenix *ipso facto* dedicated the alley to the public.

The court seems to take the view that the owner of the twenty foot strip had a right to object to its annexation as an alley, but that after the adoption of Ordinance No. 192 of the Common Council of Phoenix that the right ceased.

Now if the annexation statute referred to required a notice sufficient to apprise an ordinarily intelligent person of the intention to condemn property delineated as an alley, and if it gave a fair opportunity to fix a value for the taking, then petitioners would not have been deprived of their property without due process of law.

That the very essence of due process of law is that reasonable notice be given of THE THING WHICH IS PROPOSED TO BE DONE is elementary and needs no citations to support it.

Petitioners have set forth Ordinance No. 192 in the Appendix hereto, and Section 1, of Session Laws of 1893 in order that the court can see that no person would suppose from the proceeding on the matter required that anything

was contemplated except the annexation of the property within the outer boundaries described, thus bringing all pre existing streets and alleys within the municipal control.

It is said in:

> McQillin on Municipal Corporations, Vol. 1, at page 859, fourth line from the bottom:
>
> "The annexation must not impair property rights,"

and again on page 860:

> "The extension of the boundaries of a municipal corporation does not affect its property rights."

Citing:

Herzir v. *John,* 37 Ind. 415;
Springwells v. *Wayne County Treasurer,* 58 Mich. 240, 25 N. W. 329;
Milwaukee v. *Milwaukee,* 12 Wis. 93.

Summary.

Your Petitioners are relying in this petition and brief for certiorari upon the contentions that they have been deprived of their property without due process of law for two reasons, to-wit:

1. The Superior Court should not have gone ahead with the trial without allowing time for petitioners to answer to the new cross complainants, the Consolidated Motors, Incorporated.

2. By holding that petitioners' land was dedicated to public use as an alley without his consent and without compensation by the mere expedient of annexation amounted to a taking of petitioners' property without due process of law.

Also by depriving petitioners of their land by injecting a new issue, that of annexation dedication, that petitioners were given no opportunity to meet until after the Opinion of the Supreme Court was rendered.

The Supreme Court refused to recede from their position even when it was clearly pointed out upon Motion for Rehearing.

Wherefore it is respectfully submitted that a Writ of Certiorari should issue in this cause.

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Phoenix, Arizona.

E. E. SELDEN,
Associate Counsel.

APPENDIX.

Ordinance No. 192

An ordinance annexing to the City of Phoenix, in the county of Maricopa, Territory of Arizona, the land, property and territory situate, lying and being in said county and Territory, to-wit:

The Southeast quarter (¼) of section five (5) in Township one (1) North, Range three (3) East of Gila and Salt River Base and Meridian.

Whereas, a petition has been filed with the City Recorder, and the Common Council of the City of Phoenix, signed by the owners of more than one half in value, according to the last assessment in Maricopa County, of the land, property and territory in Maricopa County, Territory of Arizona, hereinafter mentioned, to-wit:

The Southeast quarter (¼) of section five (5) in Township one (1) North, Range three (3) East, Gila and Salt River Base and Meridian according to the United States survey, and commonly known as the Churchill Addition to the City of Phoenix, and lying contiguous thereto, and not embraced within its limits, and asking that said tract of land, property and territory be annexed to said City in conformity with the provisions of an act entitled "An act authorizing Incorporated Cities to extend and enlarge their limits". approved April 12th. 1893.

Now, therefore, the Common Council of the City of Phoenix do ordain as follows:

Section 1.—

That the said property and tract of land and territory hereinbefore mentioned and described, be, and the same is hereby annexed to, made a part of, and included within the Corporate limits of the City of Phoenix, County of Maricopa, Territory of Arizona, and the same and every part thereof shall hereinafter be a part and parcel of said City for all purposes whatsoever.

Section 2.—

This ordinance shall be in force and effect, from and after its passage, and publication according to law.

Passed by the Common Council, this 27th day of February, A. D. 1895.

Approved this 27th day of February, A. D. 1895.

J. D. MONIHON,
Mayor.

Attest:

ED. SCHWARTZ,
City Recorder.

Recorder's Office,

Phoenix, Maricopa Co., A. T.

Filed and recorded at request of City Council of Phoenix A. T. June 27, 1895, at 11:05 A. M. Book 2 of maps, page 48.

WINTHROP SEARS,
County Recorder.

I, R. L. Rosson, Mayor of the City of Phoenix, hereby duly certify that the foregoing is a true copy of Ordinance 192, entitled "An Ordinance annexing to the City of Phoenix, in the County of Maricopa, Territory of Arizona, the land, property, and territory, situate, lying and being in said County and Territory, to wit:

The Southeast quarter (¼) of section 5 in township one (1) North, range three (3) East of Gila and Salt River Base and Meridian, passed and approved February 27, 1895. I further certify that the map hereto annexed, entitled "Plat of the survey of the Churchill Addition to the City of Phoenix", is an accurate map of the territory annexed to said City of Phoenix, under and by said Ordinance No. 192.

Witness my hand and the seal of said City, the 24th day of June, 1895.

[SEAL.]

R. L. ROSSON,
Mayor of the City of Phoenix.

Plat of the Survey of

Churchill Addition

To the City of Phoenix

Section 1, Act No. 75, Session Laws of 1893.

IN

THE REVISED STATUTES OF ARIZONA OF 1901;

IN

TITLE 11, CHAPTER IV, PARAGRAPH 509, PAGE 232,

Section 1—That any incorporated city now existing in this territory may extend, enlarge and increase its corporate limits in the manner following:

That on presentation of a petition in writing, signed by the owners of not less than one-half (in value) of the property in any territory contiguous to any duly incorporated city in this territory (as shown by the last assessment of said property) and not embraced within its limits, the common council of said city may, by ordinance, annex such territory to said city, upon filing a copy of such ordinance with an accurate map of the territory annexed, duly certified by the mayor of said city, in the office of the county recorder, in the county where the annexed territory is situated and have the same recorded therein.

Comment.

From the above Ordinance No. 192, supported by the above Statute under which the ordinance was enacted it is apparent that the required number of names, representing assessed values, was filed with the common council of Phoenix, which did act on the petition, by ordinance No. 192, and did not record the same until June 27, 1895, four months after the ordinance was passed and approved by the mayor. The above statute fixes the date of annexation at the recordation.

The Opinion of the State Supreme Court of Arizona, on page 4, recites that when it was incorporated into the city by ordinance that the owners of Block 1 raised no objection thereto.

There is no provision in the above statute that permits the raising of any objection, by any one, to either the annexation, the ordinance, or objection to any map, whatever that the city may cause to be filed.

The so-called dedication rests squarely upon the annexation.

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TOPIC INDEX

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SUPREME COURT OF THE UNITED STATES

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Supreme Court of the State of Arizona, filed July 15, 1942, is reported in 127 Pac. 2d 716 and appears at page 183 of the record herein. Rehearing was denied September 16, 1942 (Tr. 185).

Statement of the Case

The petitioner, J. D. Collins, brought action in May, 1938, in the Superior Court of Maricopa County, Arizona, to restrain the respondents, W. R. Wayland, Fred G. Holmes and Del E. Webb, from doing certain acts in connection with the property in question. The respond-

ents filed their answer and a cross-complaint, and thereafter, with leave of court, a second amended cross-complaint. The City of Phoenix and C. Claude Dye, by proper proceedings in intervention, became parties plaintiff to the second amended cross-complaint. By proper proceedings the petitioners Hattie L. Mosher and Julia C. Collins were, on order of Court, made parties defendant to the second amended cross-complaint. Issue was joined, among others, upon the question as to whether or not the property in question was a public alley and dedicated to the public use as such alley. On September 7, 1940, the cause was set for trial on November 7, 1940. On November 6, 1940, the petitioners moved that Consolidated Motors, Inc. be brought in as a party plaintiff to the second amended cross-complaint. On November 7, 1940, when the cause came on for trial, the petitioners filed a motion for change of trial judge. This motion was denied. Consolidated Motors, Inc. filed its consent to be, and on order of the trial court was, made a party plaintiff to the second amended cross-complaint adopting the Second Amended Cross-Complaint as its pleading.

The petitioners then moved that the trial setting be vacated and petitioners allowed time within which to answer the pleading of Consolidated Motors Inc. The motion was denied. Petitioners thereupon filed an affidavit of bias and prejudice against the trial judge, Arthur T. LaPrade. Judge LaPrade then continued the trial to November 12, 1940. On November 12, 1940, Judge LaPrade assigned the case to Judge Farley. Judge Farley called the case for trial and the respondents announced ready for trial. Judge Farley ordered the trial to proceed. The petitioners refused to participate and left the courtroom. Evidence was intro-

duced by the respondents. At the close of the evidence the trial court entered judgment for respondents. The judgment was affirmed by the Supreme Court of Arizona.

Numerous dilatory proceedings by petitioner in no way material to the questions here are not included in this statement.

Summary of Argument

The Petition should be denied because:

1. No federal question is presented by the Petition filed in this Court.

2. The determination of a federal question was not necessary for the decision below.

Argument

1.

The Petition should be denied because:

No federal question is presented by the Petition filed in this Court.

(a) Petitioners' first question.

The Petitioners' first question brings in issue the decision of the State Supreme Court on a purely procedural question. No federal question is presented and no question for review by this Court.

Thorington v. Montgomery, 147 U. S. 490, 13 S. Ct. 394, 37 L. Ed. 252.

Gibson v. Mississippi, 162 U. S. 565, 16 S. Ct. 904, 40 L. Ed. 1075

The respondent, Consolidated Motors, Inc, was brought in as a party plaintiff to the second amended cross-complaint *on motion of petitioners* and adopted the pleadings of the then cross-complainants. The cause was then at issue as to all other respondents and had been called for trial. No separate trial as to Consolidated Motors, Inc., was requested by petitioners.

Rule 21. *Rules of Civil Procedure for the Superior Courts of Arizona.* See Appendix.

If a federal question were presented it would be *only* as to the action on behalf of Consolidated Motors, Inc., and would in no way affect the judgment in favor of the remaining respondents.

(b) Petitioners' second question.

The Petitioners' second question brings in issue the decision of the State Supreme Court upon the interpretation to be given a state statute. No federal question is involved or was presented below. The petitioners in their Petition for Rehearing in the State Supreme Court admitted that the law provided for a hearing on the question of annexation and for notice of such hearing.

See page 207 of Record.

The decision of a state court upon a question of evidence or the construction of a state statute presents no federal question.

Bell Tel. Co. of Penn. v. Penn. Pub. U. Co, 309 U. S. 30, 60 S. Ct. 411, 84 L. Ed. 563.

State Tax Comm. v. Van Cott, 306 U. S. 511, 59 S. Ct. 305, 83 L. Ed. 950.

R. R. Comm. of Cal. v. Los Angeles Ry Corp., 280 U. S. 145, 50 S. Ct. 71, 74 L. Ed. 234.

The decision of the state court is upon a question of evidence—the sufficiency of the evidence to show dedication. The annexation proceeding is considered merely as one item of evidence to show or sustain the dedication of the property to the public use as an alley.

Enterprise Irr. Dist. v. Farmer's Mut. Canal Co., 243 U. S. 157, 37 S. Ct. 318, 61 L. Ed. 644.

The Petition should be denied because:

The determination of a federal question was not necessary for the decision below.

Petitioners' second question.

The decision of the State Supreme Court that dedication was shown by the City in 1912 taking possession of the property and constructing a sewer, by the public occupancy and use of the property, and by the failure of the petitioners to list for taxes or pay taxes on the property is sufficient for the determination of the cause without regard to the evidence as to the annexation. The non-federal ground is broad enough to sustain the judgment without consideration of a federal question. If a federal question were presented in con-

nection with the annexation proceedings, it was not necessary to the determination of the cause below.

Fox Film Corp. v. Muller, 296 U. S. 207, 56 S. Ct. 183, 80 L. Ed. 158.

McCoy v Shaw, 277 U. S. 302, 48 S. Ct. 519, 72 L. Ed. 891.

In any event, no question of due process or the taking of property without compensation could be presented in the state court or in this Court since the annexation statute provided for notice and an opportunity to be heard.

See petitioners' Petition for Rehearing, page 207 of Record.

Conclusion

It is respectfully submitted that the Petition fails to present grounds sufficient to authorize the issuance of a Writ of Certiorari and the Petition should be denied.

Respectfully submitted,

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CHARLES L. STROUSS
Counsel for Respondents,
W. R. Wayland, Fred G. Holmes, Del E. Webb and Consolidated Motors, Inc.

MARK WILMER
Of Counsel.

Appendix

Rule 21, Rules of Civil Procedure for the Superior Courts of Arizona:

> Rule 21. *Misjoinder and Non-Joinder of Parties.* Misjoinder of parties not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any state of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.